Agencies and Metal Timor Ltd., one or the other could have carried out mining works but between them it was decided that the respondents would do it. The respondents knew or had reason to know the rights of the parties involved in the arrangement. They knew that Suzuki was originally involved in getting the sub-lease from Che Habsah and that he stood to get a share out of the profits from the land. They also knew that as long as each recognised the other's rights to the tributes the absence of proper documents did not matter very much.

Now that a dispute is before the court the respondents insist on proper documents. In the light of the evidence in this case I do not think a court of equity will allow them to deny others of their rights. The documents produced at the trial may not have spelt out all those rights but there is no denying of the fact that the respondents recognised those rights when they paid Suzuki or his assignees the tributes. In all the circumstances of this case justice requires that the respondents should continue paying the appellants the tributes in accordance with the letter of guarantee. I would, therefore, allow this appeal.

On the question whether the appellants' rights to the tributes are subject to equities this can only be answered after the accounts have been taken.

Accordingly, I would set aside the judgment of the trial court and enter judgment for the appellants with costs in terms of the prayers set out in the statement of claim.

The appellants shall also have the costs of this appeal.

Gill C.J. (Malaya) and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Allen & Gledhill.*

SIO KOON LIM & ANOR. v. S.B. MEHRA

[F.C. (Ali and Wan Suleiman F.JJ. and Syed Othman J.) March 10, 1975]
[Johore Bahru — Federal Court Civil Appeal No. 79 of 1974]

Practice and Procedure — Specially indorsed writ — Application for summary judgment — Whether writ a nullity — Claim not founded on allegation of fraud.

The respondent had by a specially indorsed writ claimed accounts of a partnership. The appellants applied to have the writ dismissed or struck out on the ground that the writ specially indorsed was a nullity as the claim was founded on an allegation of fraud. The learned trial judge dismissed the application and the appellants appealed.

Held, dismissing the appeal: the respondent's action in this case was not founded on any allegation of fraud and therefore the learned judge was right in holding that the writ was not a nullity. The cause of action was based on an alleged breach of the agreement for dissolution of the partnership and the alleged fraud had nothing to do with the respondent's present cause of action.

Cases referred to:-

(1) *Khong Kim Ching* v. *Hassan bin Din & Ors.* [1973] 2 M.L.J. 173.

(2) *Grant Advertising International Inc. & Anor.* v. *Glaze* [1968] 1 M.L.J. 31.

FEDERAL COURT.

H. B. Ball for the first appellant.

A. K. Bashir for the second appellant.

V. Krishnan for the respondent.

In the court below, A. K. Bashir appearing for the applicants/defendants and V. Krishnan for the respondent/plaintiff, the following judgment was delivered on July 15, 1974:

Ibrahim J.: In this Summons-in-Chambers No. J 9/74 dated February 15, 1974 (encl. 246) defendants have applied for the following orders:

(1) That this action be dismissed and/or struck out and/or all proceedings herein be set aside with costs on the grounds that the Writ of Summons herein is nullity, alternatively,

(2) That this action be dismissed for failure to furnish or comply with Order for security for costs

and (3) That costs of this application and/or this action be taxed and paid by plaintiff to defendants.

On May 14, 1974 the court dismissed the application with costs. Defendants are appealing against that decision after a certificate under O.54 r.22A of the Rules of the Supreme Court, 1957 has been given on May 25, 1974 that no further argument was required.

It is necessary to go over the progress of the action itself in order to better appreciate this application and perhaps its dismissal with costs.

A Specially Indorsed Writ was originally filed in and sued out by the Muar High Court as Civil Suit No. 122 of 1972 on October 7, 1972 (encl. 2). An Amended Statement of Claim (encl. 19) was filed on October 15, 1972 and the prayers as amended read as follows:

(i) Judgment against the first defendant in the sum of $85,000/- together with interest on all monies outstanding at the rate of one (1) percent per month with monthly rests.

(ii) That the defendants do within five (5) days from the date of service of this order on them deliver all the books of account of the partnership to Mr. Allan Lim Aik to inspect and to take all proper accounts and inquiries concerning the partnership.

(iii) An order for payment by the defendants to the plaintiff of any sum found due upon taking such account.

(iv) An order that a receiver of the assets of the said partnership be appointed.

(v) Any consequential orders as the Honourable Court may deem fit to make.

(vi) Costs of this action on the basis of solicitor and client to be taxed by an officer of this court and be paid by the defendants to the plaintiff when so taxed.

Prayers (i) and (iii) are new prayers added by the amendment. Paragraph 5 of the Statement of Claim reads as follows:

"Sometime in August 1972 the plaintiff discovered that the first defendant had on 27th July, 1972 *fraudulently,* dishonestly and in breach of the said Agreement registered a business known as 'Kingwood Timber Industries' with the first defendant and one Lim Pat Luan the second defendant (who was then employed as a Manager) as the partners thereof."

On the same day that the Writ was filed an application was made by planitiff by Notice of Motion (encl. 4) for an interim injunction "restraining the defendants . . . from damaging, removing, carrying away or disposing with any of the stock-in-trade belonging

to the partnership known as Kingwood Timber Industries" and on the following day, *i.e.* October 8, 1972 Gill F.J. (as he then was) granted the application (encl. 6).

On October 14, 1972 defendants filed a Notice of Motion (encl. 17) asking that:

(1) the said injunction may be discharged,

(2) plaintiff be ordered to give security for costs and for damages to be assessed by way of payment into court

and (3) the proceedings be transferred to Malacca High Court.

On the same day that the Amended Statement of Claim was filed plaintiff also filed a Summons-in-Chambers (encl. 20) asking for among other things summary judgment to be entered against first defendant in the sum of $85,000.

Gill F.J. (as he then was) adjourned the Summons-in-Chambers (encl. 20) to Open Court and heard it together with the Notice of Motion (encl. 17) on November 15, 1972. The record shows that plaintiff's request for summary judgment was withdrawn and in respect of the Notice of Motion the court ordered (encl. 49) that:

(1) the said injunction be vacated and do cease to have effect,

(2) plaintiff do furnish security for costs in the sum of $5,000 within 30 days,

(3) these proceedings be transferred to the High Court at Malacca,

(4) the costs of and incidental to the said application be costs in the cause and

(5) there be liberty to apply.

The proceedings were duly transferred to Malacca High Court on November 22, 1972 and entered in the Cause Book as Malacca Civil Suit No. 116/72 (encl. 52). A bond was executed on December 8, 1972 but on an application made by defendants in Summons-in-Chambers dated December 23, 1972 (encl. 91) Pawan Ahmad J. on May 16, 1973 ordered that the said bond be discharged and that plaintiff do furnish security by paying into court the sum of $5,000. His Lordship also ordered costs to be paid by plaintiff to defendants. The $5,000 was deposited into court on May 22, 1973 and the costs were taxed on August 23, 1973 at $733.40 (encl. 184).

On December 21, 1972 plaintiff applied in Summons-in-Chambers for certain orders to be made and Pawan Ahmad J. on April 20, 1973 ordered that:

(1) defendants do within 14 days deliver all books of account of the partnership to the Interim Receiver to inspect and to take all proper accounts or inquiries concerning the partnership,

(2) defendants do pay the Interim Receiver for payment into court any sum found due upon the taking of such accounts

and (3) the costs of this application be paid by defendants to plaintiff.

Plaintiff's costs were taxed on September 25, 1973 at $951.55 (encl. 194). Defendants appealed against this decision vide Federal Court Civil Appeal No. 61/73 and on December 7, 1973 the Federal Court allowed the appeal with costs (of the Appeal only). The costs were taxed on May 15, 1974 at $2,004.85 (encl. 35 in Appeal file).

On July 31, 1973 plaintiff by a Notice of Motion (encl. 186) applied for commital of defendants to prison for their contempt of court in refusing or failing to deliver all books of account of the partnership to the Interim Receiver etc. The application came up before Pawan Ahmad J. on September 27, 1973 when it was withdrawn and costs were ordered against plaintiff. The costs were taxed on December 21, 1973 at $631.20 (encl. 217).

On December 15, 1973 defendants applied by Summons-in-Chambers (encl. 223) that plaintiff be ordered within 14 days to give further security for defendants' costs in the sum of $8,000 in default of which the action be dismissed and for certain other orders. This application was heard on January 2, 1974 when it was ordered (encl. 243) that:

(1) plaintiff do within 14 days give further security for defendants' costs in the sum of $750/- in default of which this action be dismissed,

(2) the costs of $733.40 taxed pursuant to Order of court dated 16th May 1973 be paid out to defendants from the sum of $5,000/- deposited by plaintiff

and (3) the costs of and incidental to this application be costs in the cause.

Hearing of the action commenced as fixed on January 4, 1974 and adjourned to June 10, 1974 for continued hearing.

In respect of the first prayer Mr. Bashir has relied on *Khong Kim Ching* v. *Hassan bin Din & Ors.* [1] where it was held that:

"(1) No claim founded on an allegation of fraud can be made by a specially indorsed writ and in so doing by their amendments, the plaintiff was in breach of a rule which expressly forbids such a practice.

(2) A specially indorsed writ which is indorsed with a statement of claim containing claims contrary to O.3 r.6 of the Rules of the Supreme Court is a nullity and not a curable irregularity."

O.3 r.6(1) reads as follows:

"6.(1) In any action other than one which includes:

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud, the writ of summons may, at the option of the plaintiff, be specially indorsed with or accompanied by a statement of his claim."

On the assumption that the Specially Indorsed Writ was a nullity Mr. Krishnan has asked the court that it be converted to a General Writ and in support of his request he has referred the court to *Grant Advertising International Inc. & Anor.* v. *Glaze* [2] where Raja Azlan Shah J. (as he then was) ruled that a specially indorsed writ could be converted to a general writ. At page 32 His Lordship said:

"There are numerous decided cases on the point but I need only quote the local case of *Looi Guan Kway* v. *Low Lean Bok* (1938) M.L.J. 35 where, upon an application by the plaintiff to amend the plaint, Aitken J., after a study of the relevant authorities enunciated three subsidiary principles for the guidance of the court:—

1. There are *bona fides* on the part of the applicant;

2. They cause no prejudice to the other side which cannot be compensated by costs; and
3. They are not such as to turn a suit of one character into a suit of another and inconsistent character.

....As was stated by Cotton L.J. in the case of *Kurtz* v. *Spence* (36 Ch. D. 770, 773):

'When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendments, having regard to the rule, and to the direction in the Judicature Act that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent a multiplicity of actions?'

I can see no prejudice caused to the defendant if the application is allowed, as he will in turn be given leave to amend his defence if he so chooses: nor can I find any *mala fides* on the part of the plaintiffs in wanting to amend their pleadings at this stage."

I agree that the Writ in this case could be converted for Chang Min Tat J. himself in *Khong Kim Ching's* case at page 175 had said:

"Mr. Rajah also contended that the court would always allow, if necessary upon terms, in the exercise of the discretion, the conversion of one form to another. He cited *Grant Advertising International Inc. & Anor.* v. *Glaze* [1968] 1 M.L.J. 31 but the whole point of that case is the application made by the plaintiff to convert his specially indorsed writ, and not the resistance as in this case to the application to strike out on the contention that the writ was not a nullity. If there had been such an application to amend and provided that the applicant fulfilled the conditions laid down by Aitken J. in *Looi Guan Kway* v. *Low Lean Bok* [1938] M.L.J. 35 and adopted by my brother Raja Azlan Shah J. in *Grant's* case, *supra*, the court might perhaps be moved to grant the amendment. But there is, as Mr. Moganasundram had pointed out, no such application and in the face of this intransigence on the part of the plaintiff it becomes unfortunately necessary for me to rule on the present application before me to strike out the writ."

Mr. Bashir has objected to Mr. Krishnan's request for conversion because plaintiff had taken advantage of O.14 when he applied for summary judgment which incidentally was withdrawn when it came up for hearing on November 15, 1972.

I would have ordered the conversion of the Writ had I not been of the view that it was not a nullity. I have come to that view after considering the provision of O.14 r.1(b) which reads as follows:

"(b). If on the hearing of any application under this Rule it shall appear that any claim which could not have been specially indorsed under O.3 r.6 has been included in the indorsement on the writ, the judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim."

The effect of the above sub-rule is explained in the *Annual Practice*, 1957 at page 171 as follows:

"Having regard to the wide extension of O.3 r.6, this rule would seem to apply only to cases where the plaintiff has used a specially indorsed writ in an action where he includes a claim for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, or in an action in which he includes a claim alleging fraud. The concluding words, 'allow the action to proceed as respects the residue of the claim' appear to sanction compound claims partly special and partly not, and to provide that judgment under O.14 may, in such cases, be obtained for the special part of the claim without prejudice to proceedings as to the residue .... the rule appears to be intended to give the court discretionary power to prevent technical objections from defeating the purpose of O.14 in cases where a *bona fide* mistake has been made in drawing a special indorsement."

I am satisfied that a *bona fide* mistake has been made in drawing a special indorsement and as no one especially defendants could in any way be said to be prejudiced by it I see no reason why a technical mistake should prevent compound claims to be made in the Writ in this case. The hearing of the action has commenced on January 4, 1974 and adjourned to June 10, 1974 for continuation and surely it would not be in the interests of the parties concerned that a fresh action should be taken and a fresh hearing started. Again if the Writ is a nullity it would appear to me that all previous proceedings connected therewith, particularly the appeal heard by the Federal Court and the various orders as to costs which have been taxed and some of which have been paid would also be null and void.

As to the second prayer the court has on January 2, 1974 ordered that a further security of $750 be deposited by plaintiff into court in addition to the $5,000 which has already been ordered by Gill F.J. (as he then was) on November 15, 1972. As the sum of $750 has duly been deposited I could see no merit in this prayer. When defendants' application for the amount of security to be increased was heard on January 2, 1974 defendants' costs in respect of the orders dated May 16, 1973 and September 29, 1973 have already been taxed at $733.40 and $631.20 respectively, making a total of $1,364.60. The Federal Court has also by then allowed defendants' appeal with costs but the costs have not yet been taxed then. When Gill F.J. (as he then was) fixed the sum of $5,000 on November 15, 1972 His Lordship has also set aside the interim injunction which His Lordship granted to plaintiff on October 8, 1972 and it was quite obvious to me that His Lordship has fixed that sum after taking into account the costs in respect of the application therefor and that in this case as in other similar cases it was most likely that there would be other applications before the action is finally disposed of. Bearing that in mind I considered that a sum of $750 would be more than sufficient security in addition to the $5,000 already ordered by Gill F.J. (as he then was). When making that order I have not considered the costs of the Federal Court appeal though I then assumed that the High Court costs would also be awarded to defendants by the Federal Court.

In the event I dismissed this application with costs.

From the above judgment the applicants appealed to the Federal Court. The leading judgment of the Federal Court was as follows:

Ali F.J.: By a specially indorsed writ dated October 7, 1972 filed in the High Court at Muar the plaintiff, the late Lt. Col. S. B. Mehra, prayed for an order in the following terms:

(i) that the defendants do within five (5) days from the date of service of this order on them deliver all the books of account to the partnership to Mr. Allan Lim Aik to inspect and take all proper accounts and inquiries concerning the partnership;

(ii) An order that a receiver of the assets of the said partnership be appointed;

(iii) Any consequential orders as the Honourable Court may seem fit to make;

(iv) Costs of this action on the basis of solicitor and client to be taxed by an officer of this court and be paid by the defendants to the plaintiff when so taxed.

On October 14, 1972 he filed an amended statement of claim purporting to have been done so under O.28 r.2 of the Rules of the Supreme Court, 1957. In the statement of claim, original or amended, he referred to two agreements, one dated June 10, 1972 and the other, dated September 14, 1972. The second agreement was referred to as a Dissolution Agreement setting out the terms for the dissolution of an alleged partnership between him and the first defendant, Sio Koon Lin, and which relates to the appointment of Mr. George Taye as Arbitrator with powers to appoint a qualified auditor to inspect the books of account of the alleged partnership. (See paragraph 7 of the Statement of Claim). In paragraph 8 it is stated —

"8. On or about the 20th day of September, 1972 the said George Taye acting as the Arbitrator and accompanied by one Allan Lim Aik an accountant called at the office of the partnership to inspect the account books but they were not made available to them. Subsequent attempts to obtain possession of all the accounts books for the said Allan Lim Aik's inspection met with no success."

This was followed by the prayers referred to above.

Both defendants filed a joint defence on October 14, 1972. They denied the existence of the alleged partnership. Although they admitted the second agreement dated September 14, 1972 they maintained that it is not in respect of a dissolution of partnership but a loan agreement.

On October 15, 1972 the plaintiff by summons in chambers applied for summary judgment under Order 14 of the Rules of the Supreme Court, 1957. This was opposed by the defendants who filed an affidavit showing cause under O.14 r.3. The affidavit was not sworn by the defendants themselves but by their solicitor, Mr. Bashir, who claimed that he had full knowledge of the facts relevant to the dispute even including those which could only be known to the defendants or either of them. On those facts it was maintained that there were triable issues. There was no complaint that the specially indorsed writ in this case is a nullity. Its nullity was raised more than a year later. By summons in chambers dated February 15, 1974 the defendants applied to have the action dismissed or struck out on the ground that the writ specially indorsed with a claim founded on an allegation of fraud is a nullity. At the hearing of this appeal Mr. Ball, counsel for the first appellant, said that but for the decision of Chang Min Tat J. in *Khong Kim Ching* v. *Hassan bin Din & Ors.*[1] in the High Court at Penang the application would not have been made.

The application was dismissed by Ibrahim J. who was of the view that the writ is not a nullity. The only ground of the present appeal is that the learned judge erred in coming to that view.

The question for consideration is whether the defendants are right in the view that the plaintiff's claim is founded on an allegation of fraud. In my judgment they are not right because it is clearly not so founded. The plaintiff's action arose out of the defendants' alleged failure to make available the books of account as stated in paragraph 8 of the statement of claim. Such failure would be a breach of the dissolution agreement dated September 14, 1972 as referred to in paragraph 6. The allegation of fraud is stated in paragraph 5 as follows:

"5. Sometime in August, 1972 the plaintiff discovered that the 1st defendant had on 27th July, 1972 fraudulently, dishonestly and in breach of the said Agreement registered a business known as 'Kingswood Timber Industries' with the defendant and one Lim Pat Luan the 2nd defendant (who was then employed as manager) as the partners thereof."

Thus stated it would be clear that the fraud alleged has nothing to do with the plaintiff's present cause of action which is based on an alleged breach of the said agreement dated September 14, 1972. Whether or not the first agreement dated June 10, 1972 had come to an end by reason of the first defendant's fraud is not, in my view, relevant to the present dispute. Even if fraud is relevant it is certainly not the basis of the plaintiff's claim. In view of this I do not find it necessary to express an opinion on the decision in *Khong Kim Ching* v. *Hassan bin Din & Ors.*[1] The Federal Court will no doubt consider it when the opportunity arises. If I may say so such opportunity did arise in a recent appeal† in which judgment was reserved.

The present appeal is, therefore, dismissed with costs. Deposit to the respondent towards payment of taxed costs.

Wan Suleiman F.J. and **Syed Othman J.** concurred.

Appeal dismissed.

Solicitors: *Humfrey Ball; Bashir & Co.; Mah Kok & Din.*

† *Tan Chwee Geok & Ors.* v. *Khaw Yen-Yen* (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Ali F.J., May 9, 1975 to be reported).

EMPLOYEES PROVIDENT FUND BOARD v. M.S. ALLY & CO. LTD.

[F.C. (Gill C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.JJ.) March 28, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1974]

Employees Provident Fund Ordinance, 1951 — Working partnership — Whether working assistants in company are employees — Whether they are under contract of service — Whether profits received by working assistants are wages — Whether contributions payable.

Provident Fund — Working assistants — Whether employees — Whether under contract of service — Whether profits received are wages.

The respondent company was a private company dealing in provisions, medical supplies and general merchandise. The business of the respondent company was conducted and managed by a group of persons known as working assistants who were rewarded by a share of the profits. All capital required by the business was provided by the company and all labour and skill in the conduct and management of the business were supplied by the working assistants. The two issues that were raised in this case were (1) whether the working assistants were employees within the meaning of the Employees Provident Fund Ordinance 1951, that is whether they were persons employed under a contract of service to work for an employer; and (2) whether even if the working assistants were employees within the meaning of the Ordinance, contributions were payable by them towards the Employees Provident Fund.

The learned trial judge held that the working assistants were not employed under a contract of service and he also held that no contributions were payable by them. The appellant appealed to the Federal Court.